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or necessary for the preservation of their estate. On the contrary, it appears that the income from the estate is insufficient to furnish a support for Mrs. Leavell and her family, and that they possess no other source of revenue either to keep down the accruing interest on the loan or to discharge the principal sum at maturity.

The debt of Mrs. Grasty constitutes a charge both on the life estate of Mrs. Leavell and the estate in remainder of her infant children, and should, therefore, be borne proportionately by both. Yet, in the circumstances detailed, the result of the proposed arrangement would inure to the benefit of the life tenant (especially if the interest were not paid) at the expense of the remaindermen. The debt must ultimately be paid out of the estate, and it is to the interest of the infants that such payment shall be made as soon as practicable, in order that the life estate may bear its due proportion of the common burden.

[1] In the absence of some provision in the will on the subject, we know of no authority, either in executors or the court, to borrow money on the faith of a decedent's estate to pay debts.

[2] This case is wholly different from that of Shirkey *v.* Kirby, 110 Va. 455, 66 S. E. 40, 135 Am. St. Rep. 949, and that line of authorities relied on to affirm the decree. In that case the powers exercised by the trustee were in pursuance of an express trust created by the will, and, as the evidence plainly showed, were essential to preserve the mansion house from total ruin.

For these reasons, the decree must be reversed, and the case remanded, with directions to the circuit court to sell so much of the real estate as may be necessary to pay the debt of the appellee, Mrs. B. E. Grasty, with interest and costs of the litigation necessary for its collection in that court.

Reversed.

NORFOLK & P. TRACTION CO. *v.* CITY OF NORFOLK.

Jan. 16, 1912. On Petition to Rehear, June 12, 1913.

[78 S. E. 545.]

1. Street Railroads (§ 37*)—Construction—Repair of Streets.—The charter of a street railway company, incorporated by the state, provided that it should keep that portion of the city streets occupied by its tracks well paved and in good repair without expense to the municipality. Code 1904, § 1294i (3), authorized street railway companies to lay their tracks in the streets with the consent of munici-

palities, but required them to restore the pavements and to maintain them in good condition. Held that, in view of the strict construction against the charter, the company was required to keep pace with the growth and progress of the city and to conform its pavements to the policy of the municipality in the matter of street improvements.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 103, 105; Dec. Dig. § 37.*]

2. Streets Railroads (§ 37*)—Construction—Maintenance of Street.—In paving a street where an extra concrete base was necessary under the tracks of a street railway company, required to repair and keep in good condition the pavements between its tracks because of the weight of the company's vehicles, it was liable for the extra expense.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 103, 105; Dec. Dig. § 37.*]

3. Street Railroads (§ 37*)—Ordinances—Powers.—Where the charter of a street railway company, incorporated by the state, provided that it should keep that portion of the street occupied by its tracks well paved and in good repair without expense to the municipality, those provisions were mandatory, and the city council could not shift any burden from the company to the municipality; any attempt to do so being ultra vires.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 103, 105; Dec. Dig. § 37.*]

4. Street Railroads (§ 37*)—Equitable Estoppel.—Where the charter of a street railway company obligated it to pave and keep in repair, without expense to the city, that portion of the street within its tracks, an ultra vires ordinance shifting the burden from the railroad to the city will not estop the city from requiring a compliance with the charter.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 103, 105; Dec. Dig. § 37.*]

On Petition to Rehear.

5. Appeal and Error (§ 173*)—Presentation of Grounds of Review below—Necessity.—In an action by a city against a street railway company for the recovery of sums expended in paving that part of the street which the company was required to maintain, the contention that the company was not liable because notice to pave was not given before the city laid the pavement, cannot for the first time be raised on appeal, particularly where the agreed statement of facts did not mention it, and the omission might have been supplied below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. § 173.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

Error to Law and Chancery Court of City of Norfolk.

Assumpsit by the City of Norfolk against the Norfolk & Portsmouth Traction Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

H. W. Anderson, of Richmond, and *Walter H. Taylor,* of Norfolk, for plaintiff in error.

Geo. C. Cabell, of Norfolk, for defendant in error.

WHITTLE, J. This is an action of assumpsit brought by the defendant in error, the city of Norfolk, against the plaintiff in error, the Norfolk & Portsmouth Traction Company, to recover by way of damages the cost of materials and labor furnished and done by the plaintiff in laying wood block paving, in repaving between and for two feet beyond the outer rails of the defendant's tracks on Granby street, and for similar repaving with wood block and bitulithic paving on Botetourt street, also for furnishing materials and laying extra concrete base under the defendant's tracks in connection with such repaving. The defendant paid the cost of labor for the work, but denied liability for the cost of materials. There was a verdict and judgment for the plaintiff for $22,060.93, to which judgment this writ of error was awarded.

The question for our determination is whether the defendant is responsible for the cost of materials furnished by the plaintiff.

[1] On January 4, 1866, the General Assembly incorporated the Norfolk City Railroad Company, the predecessor of the plaintiff in error, granting the company the privilege of laying its tracks in the streets of the city of Norfolk, but upon condition that the consent of the council of the city should be first obtained. Clause 3 of the charter provides: "That said company shall keep that portion of the street occupied by its track or tracks, embracing the space between said tracks and a distance of at least two feet beyond the outer rails thereof, well paved and in good repair, without expense to the corporation of the city of Norfolk; and the rails used for said tracks shall be of the most approved pattern for such purposes, and shall be laid at the distance of five feet five inches between the outer ridges or flanges thereof, so as to form as little obstruction as practicable to the passage of carriages or other vehicles along or over said tracks."

This controversy arises not so much over the interpretation of the foregoing clause (the language of which is free from ambiguity) as it does with respect to the attempted modification of the obligations thereby imposed upon the company by

section 9 of an ordinance passed by the city council December 14, 1887.

Section 9 is as follows: "The said railway shall be so made and laid down as to conform to the established, or proposed, grades of the several streets to be occupied by it, as given by the city engineer; and in case the several streets occupied by it shall, in the future, be paved, or repaved, the city of Norfolk shall furnish and deliver the material therefor upon said streets and have the work done; but the proprietors, or lessees, of said railway shall pay the said city for the cost of labor for paving the same between the tracks and two feet on each side thereof, such amount, in case of nonpayment by the company for a period of thirty days after the work is done, to be recoverable by legal proceedings in the name of the city. And in case the grade of said streets, or any of them, or any part thereof, shall be changed hereafter, the proprietors or lessees of the said railway, at their own expense, shall make corresponding alterations of the said tracks; and the owners, proprietors or lessees of the said railway, shall keep the streets covered by said tracks, and extending two feet on the outer limits of each side of said tracks, in thorough repair at their own expense."

We have no difficulty in reaching the conclusion that, as an original proposition, the predecessor of the defendant was under charter obligation to keep its portion of the streets, as therein defined, well paved and in good repair and at its own expense. The charter so declares in language too plain to call for construction or to admit of controversy. See, also, Va. Code 1904, § 1294i (3), which authorizes a street railway company, with the consent of the municipal authorities, to lay its tracks in the streets, but likewise imposes upon such company the duty to restore the pavements of the streets and to maintain them in good condition.

The apparent conflict among the authorities on the subject of the extent of the liability of these companies is due to differences in the language of their charters.

For example, in the case of Chicago *v.* Sheldon, 9 Wall. 54, 19 L. Ed. 594, so much relied on by the plaintiff in error, the charter there construed was quite different from this charter. It required the company to keep its portion of the street "in good repair," while the language here employed is to keep it "well paved and in good repair."

In construing language similar to that found in the present charter, in cases arising in some of the most progressive and important cities of the country, the trend of the more recent and best considered decisions is to hold street railway companies

to a high degree of responsibility and strict compliance with their charter duties in relation to their occupancy of streets. The courts proceed upon the theory that franchises granted to such companies are in derogation of common right, and are considered an encroachment upon the primary use of the streets by the public, and the principle is fundamental that such grants are to be construed most strongly against the grantee. Hence it is said: "A charter, having the elements of a contract, granted to a street railway company, is to be strictly construed against the company, and it has no doubtful rights under such charter, for, when there are doubts, they are construed against the grantee and in favor of the city." Western Paving & Supply Co. *v.* Citizens' St. R. Co., 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 10 L. R. A. 770, 25 Am. St. Rep. 462. The decisions of the Supreme Court of the United States are especially pronounced in maintaining this construction. St. Clair, etc., *v.* Illinois, 96 U. S. 63, 24 L. Ed. 651; Oregon R. & N. Co. *v.* Oregonian R. Co., 130 U. S. 1, 26, 9 Sup. Ct. 409, 32 L. Ed. 837; Knoxville Water Co. *v.* Knoxville, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. Ed. 353.

As corollary to this canon of construction, it is the accepted doctrine that the obligation resting upon a street railway company to keep its portion of the streets "well paved and in good repair" (or language of like import) necessarily involves the duty to keep pace with the growth and progress of the city, and to conform its work to the policy of the municipality in the matter of street improvement. Hence for a company to pave with cobblestones could not be regarded as a compliance with its duty to keep its part of the street "well paved and in good repair," where the rest of the street is laid with wood block or bitulithic pavement.

In District of Columbia *v.* Washington R. R. Co., 4 Mackey (D. C.) 214, it was held: "That, where a street railway company's charter required it to keep its tracks and the space between the rails and two feet outside well paved and in good repair, it could be required to construct a pavement where one did not exist before its road was built, and to construct such kind of pavement as the authorities should direct."

So in the case of Mayor of the City of New York *v.* Harlem Bridge M. & F. Ry. Co., 186 N. Y. 304, 78 N. E. 1072, the clause of the charter provided: "The said grantees or their successors shall keep the surface of the street inside the rails and for one foot outside thereof, in good and proper order and repair, and conform the tracks to the grades of the streets or avenues as they now are or may hereafter be changed by the

authorities of the aforesaid towns." The court construing this clause says: "While this statute does not itself specify, as in the case of the railroad law, that this shall be done under the supervision of the municipal authorities and in accordance with their specifications, that necessarily follows from the general duties and powers conferred upon such authorities by law. Therefore, when the proper authorities, in view of the condition of the street as show to exist, decided that a granite block pavement should be laid, we think that the requirement for repairing and keeping in good order compelled the defendant to co-operate with the city, and put the space between its rails in the same condition as the rest of the street, even though that necessitated the laying of a new pavement. It has been held elsewhere by this court that an obligation, couched in substantially similar language, resting upon a railroad company, will compel it under proper conditions to lay a new kind of pavement. * * * The question of what shall constitute keeping a pavement in the tracks of a railroad company in good order and repair is to be determined, somewhat at least, by reference to existing and surrounding conditions, and in our judgment it would be altogether too nar row a view to hold that, where a municipality had for sufficient reason decided to pave a street with asphalt or other new pavement, a railroad might discharge its obligations to keep its part of the street in good order and repair by merely patching up a dirt road or some species of pavement which had become antiquated and out of condition, and which was entirely different from that adopted in the remainder of the street." Columbus St. Ry. Co. *v.* City of Columbus, 43 Ind. App. 265, 86 N. E. 83; City of Reading *v.* United Traction Co., 215 Pa. 250, 64 Atl. 446; City of Philadelphia *v.* Thirteenth, etc., Street Pass. Ry. Co., 169 Pa. 269, 33 Atl. 126; 2 Elliott, Roads & Streets, § 987.

[2] It is conceded that the materials furnished and work done on the extra concrete base were rendered necessary by the increased size and weight of the defendant's rails and rolling stock, and was of no benefit to the city, except to prevent damage to the surface of the street from inadequate foundation.

The case, in that aspect, is controlled by the case of Washington & Georgetown Ry. Co. *v.* District of Columbia, 108 U. S. 522, 2 Sup. Ct. 865, 27 L. Ed. 807. The court there held: "Where a street railway company is by law bound to keep the space within its tracks and for two feet beyond them well paved, which part of the paving is more costly than that of the rest of the street, the extra and separable expense of such part of the paving should be assessed exclusively to the company, and such company is not entitled to be relieved from a tax for paving the

street by paving the proportion thereof which the width which it is obliged to pave bears to the width of the whole street."

[3] We shall next consider the contention of the plaintiff in error that, whatever may have been its original charter obligations, it has been released by the city ordinance from all responsibility in the matter of paving its part of the streets, except only the liability to pay the city the cost of labor in doing the work.

We are of the opinion that the paving and repairing clause of the charter is mandatory, and that the city ordinance which undertakes to repeal it, in whole or in part, is ultra vires and void. The General Assembly, in granting the charter, saw fit to impose upon the company the duty of keeping the part of the streets occupied by its tracks, as therein defined, "paved and in good repair, without expense to the corporation of the city of Norfolk," and the city council had no power to shift that burden from the company to the municipality.

[4] It is said, however, that this controversy is only between the city and the company, and therefore that the state is not interested in the result, and that the city is estopped to question the validity of its own ordinance. The question is not one of policy as to whether the expense shall be borne by the city or the company, but of power. If the city has power to relieve the company from one of its mandatory charter obligations, it has power to relieve it from all; and any agreement that leads to such a result cannot be sound. If the ordinance be ultra vires and void, it cannot, of course, operate as an estoppel.

In Roanoke Gas Co. *v.* Roanoke, 88 Va. 810, 14 S. E. 665, it was held that the powers of a municipal corporation with respect to its streets are continuing and inalienable.

So in Basic City *v.* Bell, 114 Va. —, 76 S. E. 336, it was doubted whether the doctrine of equitable estoppel exists in this state as regards the powers and obligations of a municipal corporation over its streets.

In City of Reading *v.* United Traction Co., 215 Pa. 250, 64 Atl. 446, 7 Ann. Cas. 380 (see, also, notes to the principal case), it was held that a street railway company, in the absence of express contract or statutory direction, is bound to keep the portions of the streets occupied by its right of way in proper repair. The court also observes: "That the streets of a city belong to the state for the use of the people at large. To the municipality, as its agent, it commits the duty of at all times keeping them in proper repair for the convenience and safety of the public. This duty of the municipality does not shift, except when it is expressly or imposed upon another." City of Richmond *v.* Smith, 101 Va. 161, 43 S. E. 345; Bellenot *v.* City of Richmond, 108 Va.

314, 61 S. E. 785; White Oak Coal Co. v. City of Manchester, 109 Va. 749, 64 S. E. 944, 132 Am. St. Rep. 943.

These principles are grounded upon the general proposition that the Legislature, subject only to constitutional limitation, has supreme control over streets and highways, while, on the other hand, the power of a municipality is dependent upon and measured by delegation from the government, and is held and exercised in subordination to its will. The one exerts sovereign power, the other granted power, and holds its streets as trustee for the general public.

The opinion handed down at the present term in the case of Danville v. Danville Ry. & Elec. Co., 76 S. E. 913, is in harmony with the views herein expressed.

Upon the whole case, we are of opinion that the judgment is without error and should be affirmed.

Affirmed.

Upon Petition to Rehear.

PER CURIAM. The specific ground upon which a rehearing of this case is sought is because, it is said, the traction company was not called on in the first instance by the city to repave its portion of the streets. And granting that the company was under charter obligation to do such repaving, nevertheless until, after notice, it had refused to comply with such demand, the city had no authority to do the work at the company's expense, and therefore could not maintain an action to recover the cost of the work done.

It is said that this proposition is so plainly correct that it is unanswerable, and complaint is made that it was not noticed in the opinion of the court.

[5] The omission was not an inadvertence. The assignment was not discussed in the opinion, simply because no such question was properly raised by the record, and it was, therefore, not within the cognizance of an appellate court. So far as the record discloses, no such defense was relied on in the trial court, and no exception was taken on that ground. If the question had been raised in the lower court, non constat but that the city could readily have proved notice and demand. The company "was silent when it should have spoken, and it will not be heard to speak when it should be silent."

It affirmatively appears from the agreed statement of facts that "the question involved in this case is the liability of the Norfolk & Portsmouth Traction Company for the cost of the material used in laying wooden blocks on the portion of Granby street and Botetourt street lying between the tracks and two feet on each side thereof, in the year 1910, and for the cost of the material in an extra concrete foundation under the tracks."

It is a fundamental rule of practice that "exceptions of every kind, when necessary at all, should be taken in the court whose judgment is to be reviewed. Otherwise, the appellate court would be converted into one of original jurisdiction." See note to Warren *v.* Warren, 2 Va. L. Reg. 195, 196.

Burks, J., in Redd *v.* Supervisors, 31 Grat. (72 Va.) 695, at page 711, observes: "We can only review the case made, and as made, by the parties in the court below. We cannot go outside of the record and decide a case upon facts dehors. This would, in my judgment, be a palpable and flagrant abuse of appellate jurisdiction."

So, also, in Camden *v.* Doremus, 3 How. 515, 11 L. Ed. 705, it was said: "It would be more extraordinary still if, under the mask of such an objection, or mere hint at objection, a party should be permitted in an appellate court to spring upon his adversary defects which it did not appear he ever relied on, and which, if they" existed and "had been openly and specifically alleged, might have been easily cured." Warren *v.* Warren, 93 Va. 73, 24 S. E. 913; Lambert *v.* Jenkins, 112 Va. 376, 71 S. E. 718, Ann. Cas. 1913B, 778.

Authorities could be multiplied upon this obvious and settled rule of appellate practice, but the foregoing sufficiently illustrate it.

It was upon these considerations that the court did not feel called upon to notice in its opinion the assignment to which attention is now invited.

Rehearing denied.

Note.

The duty of a street railway company to keep in good repair that portion of the street occupied by its roadbed seems to be well settled in all jurisdictions, this responsibility not depending upon contractual relations. The duty to keep in good repair and the duty to pave or repave, however, are placed upon entirely distinct and different grounds of liability. In regard to the former duty the railway company stands in the shoes of the municipality and assumes the burden originally resting upon it. The duty to repair and keep the streets in good order primarily belongs to the municipality exercising the authority delegated to it by the state, and when a railway company is granted the right to use the streets, such grant carries with it the liability to keep in good repair, unless it be specifically exempted therefrom by the terms of the grant or charter.

The duty of a street railway company to pave or its liability for the expense of paving its right of way depends entirely upon the statutory enactment or contract as expressed in the statute or ordinance. There is apparently considerable conflict between decisions as to the liability of a street railway company for paving or repaving its right of way and specified distances adjacent thereto, but this is due chiefly to the different terms and provisions of the various statutes or ordinances. The right to require such duty of a railway company is unquestioned. "A general statute which requires

street railway companies to pave and repave a certain space between and outside their tracks and to pay the cost thereof is not an unreasonable exercise of the reserved power to amend or alter the charter, which required such companies to keep the street between its tracks and for two feet on each side thereof in good and sufficient repair, and is not unconstitutional as depriving the company of its property without due process of law or as impairing the obligation of the contract contained in the original grant or franchise to use the streets." 5 U. S. E. 584. Citing Fair Haven, etc., R. Co. *v.* New Haven, 203 U. S. 379, 51 L. Ed. 237, 27 S. Ct. 74.

In the present case there is no question of the liability of the railway company for its proportionate share of the expense of paving certain streets, its statutory charter clearly providing for such responsibility. The two questions of peculiar interest presented here are: First, can a municipality by ordinance or contract with a street railway company decrease or lessen the duty of the company to pave or repave between its tracks and for certain specified distances adjacent thereto as provided by statute; secondly, can a company be held liable for the cost of such paving or repaving, where the city fails to give due notice that such paving is required and proceeds to do the work itself and afterward demands payment of the company for its proportionate share? This latter point was not passed on by the court in the present case for the reason that it was not raised by the record and therefore was not properly before the court for determination. The giving or failing to give this notice may well govern or fix a railway company's liability and we have collected the authorities on this point as will appear further in this note.

The right of a municipality to decrease the liability of a street railway, bound by statutory provisions to pave between its tracks and within specified distances therefrom, has been passed on by the New York court which reached the same conclusion as our own court in the present case.

In Kent *v.* Common Council of City of Binghamton, 81 N. Y. Supp. 198, 40 Misc. Rep. 1, the court said: "Where, under its charter, a street railway company is bound to pave between its tracks and for two feet on either side of them, an agreement by it with the city that it shall be liable for only one-fifth of the expense of the paving is invalid." In the case of Conway *v.* City of Rochester, 157 N. Y. 33, 38, 51 N. E. 395, 396, the learned Chief Justice of the Court of Appeals uses expressive language prohibiting such a gift by a municipal corporation in favor of a railroad company: "The municipal authorities are given no power to relieve a railroad corporation of the whole or any portion of the needed repairs, or to impose the whole or any portion of the cost upon the abutting owners or the city at large." The learned Appellate Division adopts that reasoning in its disposition of the case at bar. Kent *v.* Common Council, 61 App. Div. 323, 70 N. Y. Supp. 465; Id., 72 App. Div. 623, 76 N. Y. Supp. 584. This doctrine, in effect, was affirmed by the Court of Appeals in Ingersoll *v.* Nassau El. R. Co., 157 N. Y. 453, 52 N. E. 545, 43 L. R. A. 236, and is followed and approved in Village of Mechanicville *v.* Stillwater & M. S. R. Co., 35 Misc. Rep. 513, 71 N. Y. Supp. 1102.

And in Weed *v.* Common Council of City of Binghamton, 56 N. Y. Supp. 105, 26 Misc. Rep. 208. "The common council of the city of Binghamton was wholly without power to exempt the defendant

from the provisions of the general railroad law. No such power is found in the charter of the city, and none can be implied. To hold that the common council possessed such power would be to hold that the common council of every city could, by resolution or contract, render nugatory the general railroad law, so far as it imposed upon street surface railroad companies the duty of sharing the expense of paving."

Nor, where the charter of a street railway company fixes the liability of the company for street paving, can the city enlarge it.

"When the extent of the liability of the corporation to the municipality for the taxes or street repairs has been fixed by the legislature, the city has no power to enlarge it. The attempt to do so would not be regulation of the manner of the exercise of the privilege, but the imposition of a condition which would operate as a denial. In this case the liability of the Philadelphia & Darby Company was fixed by the legislature. Its duty was to repair so much of the street as lay between its tracks, and no more. The duty of the defendant, its lessee, is to bear the burden imposed by law on its lessor; and the city can no more add to the burden of the one than of the other." City of Philadelphia *v.* Philadelphia City Pass. R. Co., 177 Pa. 379, 35 Atl. 720, 721.

In Fort St., etc., R. R. Co. *v.* Schneider, 15 Mich. 74, it was shown that the railway company was authorized by a city ordinance accepted by it, to construct a railway on Croghan street. By an amendment to that ordinance, also accepted by it, the railway company was obligated as follows, to wit: "If the city of Detroit pave Croghan street contemporaneously with the laying of the track on said street, said railway company shall pave their track on said street, and two feet four inches on either side thereof, at their own expense." This contemporaneous paving the city resolved to do, and did do. The assessment which was made against the complainants embraced an item for grading and excavating, as well as for paving said portion of said street. It was held, that by the terms of said amended ordinance the obligation to pave, assumed by the complainants, did not include an obligation to excavate with reference to grade, but that the city was to provide for all the work preliminary to the actual paving.

Where an ordinance of a city, which grants to a horse railway company the privilege of using its streets, requires such railway to keep portions of the street, on which it operates, in good repair, the city cannot, by a subsequent ordinance, compel the company to pave such portions of its street with specified materials, or punish anyone concerned for operating the cars of the company, where the paving was not done. Such later ordinance would be an interference with the contract between the city and the railway as contained in the ordinance granting the latter its franchise. Kansas *v.* Corrigan. 86 Mo 67.

Preliminary Demand or Notice by City.—Under an ordinance requiring a street railway company to pave after notice by the highway commissioner, and providing that, if it fails to comply with the notice, he shall do the paving—the cost to be collected of it by the city—the city cannot, without notice to he company to pave, itself do the paving, and recover therefor from the company. City of Philadelphia *v.* Hestonville, etc., R. Co., 203 Pa. 38, 52 Atl. 184.

And again in Reading *v.* United Tract. Co., 215 Pa. 250, 64 Atl. 446,

it was held, in an action against a street railway company by a city to recover for paving a portion of a street with asphalt, the city must show that the repairs were necessary, that notice had been given by the city to the defendant to repair the tracks by paving them with asphalt, and that the repairing was reasonable, necessary, and proper.

In the case of Conway *v.* City of Rochester, 157 N. Y. 33, 51 N. E. 395, the action was brought by a taxpayer and also an abutting owner upon the street to enjoin the city from paving the space between the tracks of the Rochester Railroad Company and charging the expense thereof upon the abutting owner. It was held, construing § 98 of the railroad law, that the duty of making such pavement devolved upon the railroad company after it had received a notice from the city so to do, and, if it did not comply with the requirements of the notice, the pavement should be made at the expense of the company and not that of the abutting owners. It is true that it was also then held that it was the duty of the municipal authorities to give the street railroad company 30 days' notice, which under § 98 was mandatory; but that pertained to a paving of the street, practically the making of a new street, and did not have reference to a hole existing, which endangered the lives and property of persons passing over the street. Schuster *v.* Forty-Second St., M. & St. N. Ave. Ry. Co., 192 N. Y. 403, 85 N. E. 670, 672.

The Troy & Lansingburgh Railroad was licensed by ordinance of the city of Troy, passed in 1867, to lay its track in River street, on condition that it lay a certain kind of paving between the rails, and afterwards conform to such style of paving as the city might order. In case the road refused or omitted to pave, the same was to be done by the city at the road's expense. The city charter, as amended by Laws 1889, c. 317, provided that, whenever the city should order the paving of any street, one-half the expense was to be borne by the city, and the other half by the property benefited, but that nothing therein should be held to repeal or affect any existing license or contract. A resolution of council, afterwards passed, ordered the property owners on River street to pave the street within ten days, or in default the city would pave and apportion the expense to the property benefited. Held, that such resolution did not contemplate paving under the ordinance, and as the railroad was not given the notice required by the ordinance, nor reasonable time, it was not liable for the paving between the rails, amounting to about one-third of the assessment, but only for its pro rato share, of one-half the expense of paving the entire street. Tray, etc., R. Co. *v.* Coffey, 66 Hun 160, 21 N. Y. Supp. 34.

Sufficiency of Notice.—When, after notice, the company fails to do the work so required of it, and the city then causes it to be done, its reasonable cost may be recovered by action against the company; and it is not essential to the liability of the company therefor, that the notice to make such improvements precede the letting of the contract by the city for the same. It is sufficient if such notice be given before the work is done, and while the company may still perform the same. City of Columbus *v.* Street Ry. Co., 45 O. St. 98, 12 N. E. 651.

A notice given under Railroad Law (Laws 1890, p. 1112, c. 565), § 98, to a street railroad company to repave between its tracks, and that on its default the city would pave, with a definite statement as to the extent of the repavement required, did not conclude the mu-

nicipality as to the amount of repaving required, because it erroneously stated that the area was about 140 yards, when it was in fact 1,200 yards. City of New York *v.* New York City Ry. Co., 113 N. Y. Supp. 869, 60 Misc. Rep. 487.

Liability for Injuries Caused by Defective Pavement though No Notice to Repair Given.—In the case of Doyle *v.* City of New York and Brooklyn Heights R. R. Co., 58 App. Div. 588, 69 N. Y. Supp. 120, the plaintiff was injured in consequence of the existence of a rut adjacent to the defendant railroad company's tracks, into which the wheel of a truck on which the plaintiff was riding sank, causing a cask to topple over on him. The railroad company has obtained a franchise to lay its tracks in the street under a covenant providing that the pavement be kept in thorough repair by the said company within the tracks and three feet on each side thereof with the best water stone, under the direction of such competent authority as the common council may designate. Thereafter, Railroad Law (Laws 1890, p. 1112, c. 565), § 98, was passed. It was held that both the city and the railroad company were liable to respond in damages for any injury resulting from a failure to keep the pavement of the street in such repair as to make it reasonably safe for persons lawfully using it, and that the requirement of § 98 of the railroad law, that the repairs be made "under the supervision of the proper local authorities and whenever required by them to do so and in such manner as they may prescribe," did not relieve the railroad from the duty of making repairs until ordered so to do by the local authorities. Schuster *v.* Forty-Second St., M. & St. N. Ave. Ry. Co., 192 N. Y. 403, 85 N. E. 670, 672.

Under Railroad Law, § 98, making it the duty of surface roads to keep in repair the street between, and two feet outside, their tracks, "under supervision of the local authorities and whenever required by them to do," where the company has notice of a defect, it is not relieved of liability for damages by the fact that the notice was not given by any local authority. Simon *v.* Metropolitan St. Ry. Co., 60 N. Y. Supp. 351, 29 Misc. Rep. 126.

BOYD *v.* SOUTHERN RY. CO.

June 12, 1913.

[78 S. E. 548.]

1. Railroads (§ 348*)—Injuries to Person at Crossing—Negligence —Evidence.—Where, in an action against a railroad company for injuries to a pedestrian, struck by an engine at a crossing over a spur track leading into the yard of a manufacturing plant, there was evidence that the engine, running backwards, gave no warning of its approach to the crossing, and that none of the train crew were on the lookout for the crossing, though they knew that persons crossed